BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSEPH J. ALVARADO Claimant V. **WILSON TRUCKING, LLC** Respondent AND **RIVERPORT INSURANCE COMPANY** Insurance Carrier	)))))))))	Docket No. 1,074,371

ORDER

Respondent and its insurance carrier (respondent) requests review of the August 8, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Michael G. Patton, of Emporia, Kansas, appeared for the claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 4, 2015, with exhibits attached; the transcript of Preliminary Hearing from August 5, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's need for treatment of his right knee injury was the March 13, 2015, work related accident and ordered the following: temporary total disability ordered paid at $415.68 per week from August 18, 2015, until claimant is released to return to work, has been offered accommodated work with temporary restrictions, has reached maximum medical improvement (MMI), or until further order of the court. Also ordered was a medical consultation and care with an orthopedic surgeon for treatment of the right knee. Andre Z. Oulai, M.D., remained designated as the authorized treating physician recognized

to refer claimant, if necessary, to other orthopedic surgeons or for additional medical treatment necessary for care to claimant's right knee; Mark A. Greenfield, M.D., remained authorized as required for pain management associated with the right knee. The ALJ denied treatment for claimant's claimed back and hip injuries.

Respondent appeals, arguing claimant's accident did not arise out of and in the course of his employment, nor was the accident the prevailing factor in causing the injury, the need for medical treatment or any resulting disability, and that claimant failed to meet his burden that it did. Considering all the evidence, respondent contends the Board should reverse the ALJ and find the alleged accident on March 13, 2015, solely aggravated and rendered a preexisting condition symptomatic, thereby rendering the claim not compensable. Respondent further argues the Order of the ALJ is unclear as to the extent of the right knee treatment being ordered.

Claimant argues the ALJ's Order should be affirmed.

The issue on appeal is, whether the ALJ erred by finding the alleged accident was the prevailing factor in causing the injury, the need for medical treatment and disability involving claimant's right knee.

FINDINGS OF FACT

Claimant was employed as a truck driver for respondent. Claimant injured his right knee on March 13, 2015, while helping to load hay bales for respondent. Claimant testified he stepped between two hay bales and, as he stepped back, his knee popped and he fell. Claimant finished the job for the week and reported the accident to his supervisor, who told him to see a doctor. Claimant went to Dr. Oulai. Claimant denied any prior problems with his right knee.

Claimant has a history of extensive injuries. He testified that in 1976 he broke his left and right femurs in a car accident. In 1978, he developed low back problems after being run over in a hayfield. As the result of that accident, he lost his spleen, left kidney, eight inches of his colon, half his pancreas, all of his ribs on his left side were broken, his lung was punctured and his back was broken. In 1997, claimant fell 20 feet out of a tree and broke his ribs and right shoulder and bruised his kidney. Claimant had left knee surgery in 2007 and 2012, and back surgery on October 9, 2009, which resolved his back issues. Claimant returned to driving a truck on December 6, 2009, and did so until March 13, 2015.

Claimant testified his current low back and right hip problems are due to his limp caused by his right knee injury. He denied any problems with his low back and right hip prior to the March 13, 2015, accident.

When claimant started having hip and back problems, he contacted Dr. Oulai's office and was referred to Michael D. Yost, D.O., who ordered x-rays and physical therapy. Claimant was told his right leg was two inches shorter than the left and there was nothing that could be done to fix that in order to alleviate his low back and hip pain. Dr. Yost referred claimant to Dr. Greenfield, for pain management. Claimant received two injections to soothe the pain where his hip rubs against his tailbone. Before a third injection, claimant was referred to KU Medical Center because it was determined there were no other treatment options.

Claimant reported an onset of low back pain extending into the right hip, buttocks and into the right lower extremity in July 2015, all associated with his right knee injury. Claimant sought treatment with Dr. Greenfield on July 21, 2015. Claimant also saw Ryan LaSota, M.D., on September 9, 2015, for back pain that he associated with an unrelated motor vehicle accident. Claimant's back pain was documented as being a chronic problem. Claimant questioned why the doctor would say his back pain was chronic when it had not bothered him since 2009. Claimant testified that Dr. Greenfield told him the reason for his back pain was because his knee was messed up, causing his leg to be shorter, causing his hip to rub his tailbone, causing pain in his back. Claimant has had a difference in the lengths of his legs since 1976. Initially it was half-inch to five-eighths of an inch, and later became two inches. Claimant was told he has advanced arthritis in his right knee.

Claimant met with Dr. Oulai, on March 20, 2015, with right knee pain from the March 13, 2015, work accident. Claimant described his pain as constant and severe at a ten out of ten on the pain scale. Dr. Oulai diagnosed joint pain involving the lower leg; degenerative joint disease; knee joint effusion, and underlying degenerative joint disease aggravated by a recent knee sprain at work. Claimant was treated with aspiration of joint fluid, and ice/elevation. He was allowed return to work.

An MRI performed on April 1, 2015, identified a tear involving the posterior horn of the medial meniscus with associated joint effusion. Claimant was referred to Dr. LaSota on April 20, 2015, for a preoperative physical, in preparation for a right knee arthroscopic evaluation. Claimant continued to have pain in his right knee and Dr. Oulai performed surgical repair of the medial meniscus on April 30, 2015.

Claimant met with Dr. Oulai on May 11, 2015, with post-operative pain. Dr. Oulai explained to claimant that not all of the findings can be explained by the work injury, but since claimant reported he had no prior right knee problems the injury at work exacerbated claimant's underlying degenerative joint disease of the knee.

On June 12, 2015, claimant continued to have post-operative knee pain. He was not making significant progress with physical therapy. All but one treatment option, visco supplementation, had been exhausted and Dr. Oulai put in a formal request with workers compensation to try that option.

On July 7, 2015, claimant's knee was aspirated and he received a visco supplementation injection to treat the osteoarthrosis. On July 20, 2015, claimant presented with right hip pain that radiated into his thigh and low back, which was described as sharp and stabbing. Claimant was referred to physical therapy.

On August 18, 2015, claimant reported the right knee pain was constant and radiated to the hip. Dr. Oulai examined claimant and noted that the surgery performed provided minimal relief to claimant's right knee and there were no other options he could offer claimant.

Claimant met with Dr. Greenfield on July 21, 2015, for evaluation of his back and right hip pain that radiated into the right lower extremity, and with a secondary complaint of right knee pain. Claimant reported the pain as being constant, aching and sharp. He had some numbness and tingling in the right lower extremity. Dr. Greenfield found claimant to have lumbar radiculopathy; low back pain; post-laminectomy syndrome, lumbar spine; and history of right hip and right knee pain. Dr. Greenfield recommended epidural steroid injections and an EMG of the right lower extremity.

On August 11, 2015, claimant reported low back, right knee and right hip and buttock pain. Dr. Greenfield noted claimant needed a built up shoe because of the discrepancy in the length of his right leg, but claimant was not willing to spend the money. Dr. Greenfield recommended epidural steroid injections which were administered on August 18, 2015.

On September 8, 2015, claimant's pain level was a ten out of ten. He had trouble with walking and prolonged standing. Dr. Greenfield believed claimant had persistent radicular pain and required additional interventional therapies. He recommended and administered epidural steroid injections.

Claimant met with Dr. Greenfield for a repeat evaluation on September 23, 2015. Claimant continued to have low back pain with pain extending into the hips, buttocks and lower extremities, predominately on the right. Claimant reported no change in the intensity, duration or frequency of his pain. His pain level was an eight out of ten. Dr. Greenfield again found claimant to have lumbar radiculopathy; low back pain; post-laminectomy syndrome, lumbar spine; and history of right hip and right knee pain. He recommended and administered epidural steroid injections, and further recommended that claimant increase his activity.

Claimant met with Dr. Greenfield again on October 13, 2015, with persistent right hip and leg pain and low back pain with radicular complaints. His pain level was a nine out of ten. Dr. Greenfield again diagnosed lumbar radiculopathy; low back pain; post-laminectomy syndrome, lumbar spine; and history of right hip and right knee pain. Claimant was referred to KU Medical Center for his orthopedic complaints.

In a letter dated September 23, 2015, Dr. LaSota reported he agreed with Dr. Oulai's assessment that claimant had degenerative arthritic changes and a meniscal tear in the right knee, and from an orthopedic standpoint, due to medical co-morbidities, he agreed there was nothing more to be done for claimant. Dr. LaSota opined claimant's work injury may have exacerbated underlying chronic factors.

Claimant met with Chris D. Fevurly, M.D., for an examination on November 12, 2015, at respondent's request. Dr. Fevurly noted claimant was an over-the-road driver for 40 years, but had not worked since March 20, 2015. Claimant's history of injuries is set out in detail in the doctor's report of that date. Claimant's complaints were right knee pain that was aggravated after walking more than 10 minutes; inability to climb stairs; the right knee gives way; and sciatica, which is relieved with gabapentin.

Dr. Fevurly examined claimant, noting claimant ambulated with marked antalgia and with the use of a cane. He noted claimant's right leg was two to three inches shorter than the left, and that claimant had shoulder and low back complaints. He diagnosed morbid obesity; end stage bilateral osteoarthritis in both knees; multiple trauma following a farm accident crush injury in 1978; prior right shoulder dislocation in 1997 following a 20 foot fall and a long history of street drug abuse, but claimant has been sober since 2007. An MRI performed on April 1, 2015, displayed advanced osteoarthritis in the right knee and a degenerative tear of the medial meniscus.

Dr. Fevurly opined that the March 13, 2015, work event caused an acute aggravation of marked preexisting and end stage degeneration osteoarthritis in the right knee. He also opined that in September 2015, claimant developed recurrent low back pain and right hip pain thought to be a recurrence of right lumbar radiculopathy. Claimant felt the pain and hip pain is due to his altered gait following failed right knee surgery in April 2015. The right hip and right leg pain were treated with caudal blocks with no benefit. There was improvement in the sciatica with the use of gabapentin.

Dr. Fevurly opined claimant's end stage osteoarthritis in the right knee is related to the multiple major trauma outlined in the past medical history and chronic mismatch of claimant's leg length following the comminuted fracture in 1976 and was compounded by claimant's advancing age and morbid obesity. He found the March 13, 2015, work event was an acute aggravating factor, but not the prevailing factor for claimant's right knee condition. He also noted that the April 2015 surgery did nothing but accelerate claimant's degenerative joint disease and the alternative for treatment now is total knee replacement.

Dr. Fevurly noted claimant had a similar situation in the left knee and even though not symptomatic, the left knee exam was consistent with end stage degenerative joint disease. He opined the prevailing factor for claimant's low back pain is the preexisting nature of claimant's advanced lumbar spine spondylosis, degenerative disc disease and multilevel fusion.

Dr. Fevurly did not feel claimant was at maximum medical improvement for the treatment of the chronic right knee pain, determining claimant was a candidate for bilateral total knee replacement due to the preexisting advanced osteoarthritis. No impairment rating was given, and claimant was restricted to sedentary activity only.

Claimant met with Vito J. Carabetta, M.D., on February 16, 2016, for a court-ordered independent medical examination (IME). Claimant's chief complaint was residual right knee pain. He described the pain as sharp from the superior pole to the inferior pole of the knee. Claimant showed no improvement, despite surgery, and the pain was primarily aggravated with walking more than 50-100 yards. Claimant reported his knee buckles and gives way on occasion. He also reported grinding and popping, but no clicking and swelling. Claimant also reported low back pain.

Claimant reported a work injury on March 13, 2015, where his right knee popped and he experienced sudden pain after he inadvertently stepped between two hay bales. Dr. Carabetta examined claimant's low back and knee and diagnosed status-post right knee partial medial meniscectomy, knee joint osteoarthritis, limb length discrepancy, and low back pain. He noted considerable arthritic changes in the right knee at the time of surgery, which are a persistent issue. Dr. Carabetta wrote total knee arthroplasty was a possibility, which was discussed with claimant. However, that surgery would be difficult because of the length discrepancy of claimant's limbs, therefore the decision would need to be made by an orthopedic surgeon.

Claimant also displayed ongoing low back complaints, which Dr. Carabetta determined were not causally related to the accident on March 13, 2015. He found a closer connection between claimant's long history of leg length discrepancy and the low back symptoms.

Dr. Carabetta felt claimant's ability to proceed with any work is limited and he would not be able to handle any kind of truck driving job that would require any physical labor. It is doubtful that claimant would be able to sustain the sitting tolerance required to drive a truck.

On June 24, 2016, Dr. Carabetta wrote that, with regard to causation in the right knee, the prevailing factor is the injury in question that occurred on March 13, 2015. He anticipated claimant was going to need a total joint replacement in the relatively near future. He did not feel claimant was at MMI and did not provide an impairment rating.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(d) states:

(d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

(f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) . . .
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
(3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2014 Supp. 44-508(g) states:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The medical evidence in this record supports the finding by the ALJ that claimant's right knee suffered a distinct work related injury, particularly to the medial meniscus. This Board Member agrees the prevailing factor for claimant's ongoing need for medical treatment in that knee is the accident of March 13, 2015. However, this medical record does not support a work-related connection between the accident and claimant's ongoing arthritis and associated degenerative conditions in the right knee which, according to Dr. Fevurly, predated the accident by a significant period.

The Order of the ALJ states ". . . the fact remains that, immediately after the March 13, 2015 accident, Claimant was diagnosed as suffering a "tear involving the poster[ior] horn of the medial meniscus with associated join[t] effusion." (MRI report, Exhibit 5, p. 2.). All creditable and logical medical indicators point to the instant work related injury creating this tear."[1]

The ALJ then ordered medical consultation and care by an orthopedic surgeon for treatment of claimant's right knee. The Order does not specify the extent or limits of that treatment. As the Order provides treatment for the medial meniscus tear, the Order of the ALJ is affirmed. Any treatment associated with the arthritis and degenerative conditions in the right knee are not supported by this record. The statute makes it clear an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. The determination that treatment for the low back and hip should be denied, is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[2] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed as to the Order for treatment

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[1] ALJ Order (Aug. 8, 2016) at 3.

[2] K.S.A. 2015 Supp. 44-534a.

for claimant's right knee medial meniscus tear. Treatment for the arthritis or ongoing degenerative conditions in the right knee are denied as not having arisen out of and in the course of claimant's employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven M. Roth dated August 8, 2016, is affirmed as above specified.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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